APPENDIX A

CHART OF BROWNING v. HOLLOWAY LITIGATION

LEGEND

A. Browning v. Holloway

1. Filed 9/12/79
2. Judgment 8/26/82
3. Appeal 11/24/82
4. App. Dism'd 7/11/84
5. Dism'l reinstated 3/26/85
6. NRE 7/3/85
7. Reh'g Den. 10/30/85
8. Cert. Den. 3/10/86
9. Reh'g Den. 4/28/86

B. Holloway Bankruptcy

1. Filed 11/19/79
2. Conv. to Chap. 7 10/1/82
3. PSH Objections 5/23/86
4. Bank. Ct. O/R PSH Objections 8/7/86
5. PSH Appeal 8/13/86
6. Stayed Pending BvN 8/29/88
7. Dist. Ct. Affirms 4/19/91
8. 5th Cir. Affirms 1/8/92
9. 5th Cir. Rev. Op. 1/27/92

C. Holloway v. Walker

1. Filed 11/18/82
2. Judgment 4/23/85
3. Emerg. Appl. 1/7/86
4. Emerg. Appl. Den. 3/17/86
5. 5th Cir. Affirms 3/19/86
6. Reh'g Den. 5/30/86

7. Cert. Den. 12/1/86
8. Sanctions 1/27/87

D. Browning v. Navarro

1. Filed 3/2/83
2. Judgment 1/17/84
3. BvN I 10/1/84
4. Part. Jdgmt 4/2/85
5. PSH MSJ & DJ 5/5/86
6. Judgment 5/23/86
7. BvN II 8/26/86
8. BvN III 10/23/89
9. 5th Cir. Reh'g Den. 1/26/90
10. Jdgmt w/Inj. 3/21/90
11. BvN IV 1/30/91

E. In Re: Holloway

1. Filed 3/14/86
2. Denied 3/17/86

F. Gregory v. Walker

1. Filed 5/25/84
2. Dismissed 7/12/85

G. Navarro v. Starnes

1. Filed 6/17/85
2. Judgment 12/9/91

H. Jaehne v. Starnes

1. Filed 6/17/85
2. Order 8/28/85
3. Vacated 10/31/85
4. Dismissed 1/10/86
5. Ct. App. Op. 9/23/87

6. Writ Denied 5/11/80
7. Part. Jdgmt & Sev. 4/3/91
8. Am'd Par. Jdgmt & Sev. 4/18/91
9. Jdgmt. (sev. case) 1/6/92
10. Ct. App. Af'm 7/1/92

I. Browning v. Placke

1. Leave to File & Stay 8/28/85
2. Mandamus 10/30/85

J. Holloway v. Starnes

1. Filed 6/16/86
2. Ryan Jdgmt 4/13/88
3. Ct. App. Op. 8/15/89
4. Writ Den. 2/28/90
5. Judgment 1/10/91
6. Ct. App. Af'm 6/30/92
7. Writ Denied 2/10/93
8. Reh'g Den. 3/24/93
9. Pet. for Cert. 6/22/93

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SEE FOLDOUT NO 1

APPENDIX B

NO. 86-7704-I
NO. 89-6582-I
NO. 89-10016-I

PAT S. HOLLOWAY, and BRENDA HOLLOWAY, Individually, HUMBLE EXPLORATION COMPANY, INC., STERLING PIPELINE COMPANY, FLOJO TRADING CORPORATION and ROBBIE HOLLOWAY,	§	IN THE DISTRICT COURT OF
Plaintiffs,	§	
v.	§	
MICHAEL G. STARNES, Individually, and as Co-Independent Executor and Co-Trustee of the ESTATE OF WILLIAM W. BROWNING, JR., Deceased, and as Trustee of the BROWNING CHILDRENS' TRUST and as Special Trustee; JANE H. BROWNING, Individually and as Co-Independent Executrix and Co-Trustee of the ESTATE OF WILLIAM W. BROWNING, JR., Deceased; INTERFIRST BANK DALLAS, N.A., Individually and as Co-Trustee of the ESTATE OF WILLIAM W. BROWNING, JR., Deceased; CATHERINE AGNES LAND STARNES; KATHRYN LOUISE BROWNING COOK;	§	DALLAS COUNTY, TEXAS
	§	162ND JUDICIAL DISTRICT

AVERILLE ADAMS BROWNING; §
WILLIAM WEBB BROWNING §
III; ROBERT HOLLAND §
BROWNING; WINFRED §
FALLON BROWNING VAUGHN; §
R. JACK AYRES, JR., §
Individually and LAW OFFICES §
OF R. JACK AYRES, JR., P.C., §
a corporation, §
§
Defendants.

PLAINTIFFS' AMENDED THIRD MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT THEREOF

TO THE HONORABLE JUDGE OF SAID COURT:

Now come Plaintiffs Pat S. Holloway and Brenda Holloway with this their Amended Third Motion for Summary Judgment and Brief in Support thereof, by which they would show the Court as follows:

I.

The Amended Judgment of November 11, 1982, in Cause No. 79-9623-I in the 162nd Judicial District Court of Dallas, Texas, styled *Jane H. Browning, et al. v. Pat S. Holloway, et al.*, purports to impose a constructive trust upon 100% of the issued and outstanding shares of stock of Flojo Trading Corporation, purports to impose a constructive trust upon and award legal and equitable title to all property and mineral interests owned, controlled, or held by Flojo Trading Corporation, purports to impose a constructive trust upon all property, assets, and other things of value owned, controlled, held or claimed by Flojo Trading Corporation, and further purports to

impose joint and several liability upon Flojo Trading Corporation for damages in the amount of SEVENTY MILLION DOLLARS ($70,000,000.00).

II.

Flojo Trading Corporation was not named as a defendant, was not served with citation or other process, and did not appear in any fashion at any time prior to entry of judgment in Cause No. 79-9623-I in the 162nd Judicial District court (sic) of Dallas County, Texas. Said judgment in Cause No. 79-8623-I (sic) does not recite that Flojo Trading Corporation was a defendant in that cause.

III.

The legal and beneficial stockholders of Flojo Trading Corporation were not named as defendants, were not served with citation or other process, and did not appear in any fashion at any time prior to entry of judgment in Cause No. 79-9623-I in the 162nd Judicial District Court of Dallas County, Texas. Said judgment in Cause No. 79-9623-I does not recite that any of the legal and beneficial stockholders of Flojo Trading Corporation were defendants in that cause.

IV.

The judgment in Cause No. 79-9623-I is therefore void as to Flojo Trading Corporation. Insofar as the judgment imposes joint liability and is indivisible, it is also void as to the defendants in Cause No. 79-9623-I, specifically Plaintiff in this cause Pat S. Holloway.

V.

In support of this motion, and pursuant to Rule 201 of the Texas Rules of Civil Evidence, Plaintiffs request that the Court take judicial notice of the Court's file in Cause No. 79-9623-I, styled *Jane H. Browning, et al. v. Pat S. Holloway, et al.* Plaintiffs further adopt and incorporate herein by reference the affidavit of Joe W. Holt which was previously attached to and incorporated in Plaintiffs' Third Motion for Partial Summary Judgment and Brief in this cause. A copy of said affidavit of Joe W. Holt is attached hereto as Appendix 1.

VI.

In further support of this motion, Plaintiffs submit the following authorities.

In a direct attack on a judgment, such as the Bill of Review brought in this cause, no presumptions are indulged in support of the judgment's validity. *Fender v. Moss,* 696 S.W.2d 410 (Tex. App.-Dallas 1985). As disclosed by the summary judgment evidence, namely the Court's file in Cause No. 79-9623-I and the affidavit of Joe W. Holt, Flojo Trading Corporation was never made a party, either by citation or appearance, to Cause No. 79-9623-I prior to entry of the Amended Judgment dated November 11, 1982. The judgment against Flojo Trading Corporation is therefore void. See *Peralta v. Heights Medical Center,* 485 U.S. 80, 108 S.Ct. 896 (1988).

The Supreme Court of Texas held over a century ago that if a judgment is void as against one defendant and is indivisible in nature, then it is necessarily void as against

other defendants named in the judgment. *Hulme v. Janes, Adm'r*, 6 Tex. 242, 55 Am. Dec. 774 (1851). That holding was followed in *Long v. Garnett*, 45 Tex. 400 (1876), as it has been consistently followed in the years since. See, e.g. *McLaren Rubber Co. v. Williams Auto Supply*, 81 S.W.2d 255 (Tex. Civ. App. – Eastland 1934).

The rationale, as applicable here, for such a holding is that a judgment of joint liability cannot be rendered in the absence of any party sought to be held liable. *Zodiac Corporation v. General Electric Credit Corporation*, 566 S.W.2d 341, 346 (Tex. Civ. App.-Tyler 1978). Put another way, if a trial court has not acquired jurisdiction over all of the parties affected by its judgment, then the judgment is void. *Danner v. Aetna Life Insurance Co.*, 496 S.W.2d 950 (Tex. Civ. App.-Ft. Worth 1973).

The judgment in Cause No. 79-9623-I as to joint and several liability for the $70,000,000.00 damage award is necessarily indivisible as to Flojo Trading Corporation and the other named defendants, including Pat S. Holloway. Since that judgment is void as to Flojo Trading Corporation, it is also necessarily void as to the other named defendants, including Pat S. Holloway. Likewise, the imposition of a constructive trust over the property, mineral interests, and other assets of the defendants, including Flojo Trading Corporation, is necessarily indivisible and therefore void as to all defendants in that cause, including Pat S. Holloway.

PREMISES CONSIDERED, Plaintiffs respectfully pray the Court enter judgment that the Amended Judgment of November 11, 1982 in Cause No. 79-9623-I in the

162nd Judicial District Court of Dallas County, Texas, is void.

Respectfully submitted,

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BRENDA HOLLOWAY

APPENDIX C

(Seal)

TRANSCRIPT

NO. 86-07704-I

VOLUME I

In the District Court, 162nd Judicial District Court of Texas , begun and holden within and for the County of Dallas and the State of Texas before the Honorable Judge thereof presiding.

PAT S. HOLLOWAY, ET AL — PLAINTIFF

VS.

MICHAEL G. STARNES, ET AL — DEFENDANT

APPEALED TO THE COURT OF APPEALS
FOR THE FIFTH SUPREME JUDICIAL DISTRICT
OF TEXAS, AT DALLAS.

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APPEAL BONDS FILED: APRIL 5, 1991
APRIL 5, 1991
APRIL 10, 1991

NO. 86-7704-I

PAT HOLLOWAY, ET AL	()	IN THE 162ND JUDICIAL
	()	DISTRICT COURT OF
VS.	()	
MICHAEL STARNES, ET AL	()	DALLAS COUNTY, TEXAS

* * *

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APPENDIX D

BENNIE C. JAEHNE; HERMAN JAEHNE; TED R. FERGUSON; JOE W. HOLT; FLOJO TRADING CORPORATION; MARCY HOLLOWAY; CATHERINE GAIL HOLLOWAY; PATRICK LEE HOLLOWAY; BRENDA HOLLOWAY; PAT S. HOLLOWAY as Trustee of CATHERINE GAIL HOLLOWAY; PAT S. HOLLOWAY as Trustee of PATRICK LEE HOLLOWAY; PAT S. HOLLOWAY; DON NAVARRO, as Trustee of PAT S. HOLLOWAY, HUMBLE EXPLORATION COMPANY, INC. (Now HECI Exploration Company) and STERLING PIPELINE COMPANY	)	IN THE DISTRICT COURT OF
Plaintiffs,	)	
v.	)	
MICHAEL G. STARNES, Individually and as Co-Independent Executor of the Estate of William W. Browning, Jr., Deceased, and as Trustee for the BROWNING CHILDRENS' TRUSTS; JANE H. BROWNING, Individually and as Co-Independent Executrix and as Co-Trustee of the Estate of WILLIAM W. BROWNING, JR., Deceased; G.H. KELSOE, JR., and R. JACK AYRES, JR., Individually and as a professional corporation; CATHERINE AGNES LAND	)	LEE COUNTY, TEXAS

STARNES; KATHRYN LOUISE BROWNING COOK; AVERILLE ADAMS BROWNING; WILLIAM WEBB BROWNING III; ROBERT HOLLAND BROWNING; and WINIFRED FALLON BROWNING; DEE BROWN WALKER; JOHN WRIGHT; WHITLEY R. SESSIONS; J.R. HURT; ERIC MILLER, and SOUTHWEST MEDIA CORPORATION Defendants.	)	21st JUDICIAL DISTRICT (Filed June 17, 1985)

PLAINTIFFS' ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW BENNIE C. JAEHNE, HERMAN JAEHNE, TED R. FERGUSON, JOE W. HOLT, FLOJO TRADING CORPORATION, MARCY HOLLOWAY, CATHERINE GAIL HOLLOWAY, PATRICK LEE HOLLOWAY, BRENDA HOLLOWAY, PAT S. HOLLOWAY as Trustee of CATHERINE GAIL HOLLOWAY, PAT S. HOLLOWAY as Trustee of PATRICK LEE HOLLOWAY, PAT S. HOLLOWAY (hereinafter "Holloway"), DON NAVARRO, as Trustee of PAT S. HOLLOWAY (hereinafter called the "Trustee"), HUMBLE EXPLORATION COMPANY, INC. (now HECI Exploration Company but hereinafter called "Humble") and STERLING PIPELINE COMPANY (hereinafter "Sterling") Plaintiffs, in the above entitled and numbered cause, and make and file this their Original Petition, complaining of Defendants MICHAEL G. STARNES, Individually and as Co-Independent Executor of the Estate of William W. Browning, Jr., Deceased, and as Trustee for the BROWNING CHILDREN'S TRUSTS;

JANE H. BROWNING, Individually and as Co-Independent Executrix and as Co-Trustee of the Estate of William W. Browning, Jr., Deceased; G.H. KELSOE, JR., and R. JACK AYRES, JR., Individually and as a professional corporation; CATHERINE AGNES LAND STARNES; KATHRYN LOUISE BROWNING COOK, AVERILLE ADAMS BROWNING, WILLIAM WEBB BROWNING, III, ROBERT HOLLAND BROWNING, and WINIFRED FALLON BROWNING, Individually (the foregoing Defendants being hereinafter called the "Browning Interests"); DEE BROWN WALKER, JOHN WRIGHT; WHITLEY R. SESSIONS; J. R. HURT; ERIC MILLER and SOUTHWEST MEDIA CORPORATION ("Defendants") and in support thereof would respectfully show the Court as follows:

* * *

IV

Summary of the Suit

* * *

Count Fourteen

In Count Fourteen Bennie C. Jaehne, Herman Jaehne and Joe Holt, as majority shareholders of Flojo, and Flojo itself, seek a declaratory judgment that the Void Judgment is void as to them and to recover damages from the Browning Interests. The Void Judgment purports to impose a constructive trust in favor of the Browning Interests on all the stock *and* all of the assets of Flojo, on the grounds that such corporation was the alter ego of Holloway. These plaintiffs are the actual legal and beneficial owners of their stock in Flojo, and it was the actual

legal and beneficial owner of its assets. Neither Bennie C. Jaehne nor Herman Jaehne nor Joe W. Holt nor Flojo were served with process in, or named as defendants in, or in any other way made parties to, the proceedings which resulted in the Void Judgment, which is therefore void as to them.

Count Fifteen

In Count Fifteen all Plaintiffs seek a declaratory judgment that the Void Judgment is a void judgment and, that the underlying claims of the Browning Interests are without merit as to any of Plaintiffs. Certain Plaintiffs also seek herein ancillary injunctive relief.

V.

GROUNDS FOR RELIEF

1. The following Plaintiffs were never served with process, named as defendants, or in any other way made parties in the Dallas County lawsuit which resulted in the Void Judgment:

Bennie C. Jaehne
Herman Jaehne
Joe W. Holt
Flojo Trading Corporation
Ted R. Ferguson
Brenda Holloway
Marcy Holloway
Catherine Gail Holloway
Patrick Lee Holloway
Pat S. Holloway, Trustee for Catherine Gail Holloway

Pat S. Holloway Trustee for Patrick Lee Holloway

None of the foregoing Plaintiffs except Flojo Trading Corporation was even named in the Void Judgment. Therefore, the Void Judgment is void as to them upon such grounds, in addition to the other grounds for relief set forth below.

* * *

XIX

Count Fourteen

Claim by Flojo Trading Corporation and Its Majority Shareholders to Quiet and Remove Encumbrance from Titles, for Declaratory Judgment, and for Damages

1. Flojo and its majority shareholders, Bennie Jaehne, Herman Jaehne, and Joe W. Holt, respectfully show to the Court that none of them was named as a defendant in any petition brought by the Browning Interests against Humble, Holloway, *et al*, in the proceedings which resulted in the Void Judgment, and none of such Plaintiffs was served with process in, or otherwise made a party to, the proceedings which resulted in the Void Judgment; nor did any of such Plaintiffs file an answer or otherwise voluntarily appear in the 1979 Case or the 1982 Case. Notwithstanding, the Void Judgment purports to impose a constructive trust upon all of the assets and all of the stock on Flojo.

2. Flojo seeks hereby to quiet the title to all of its assets as against the claims of the Browning Interests based on the Void Judgment and to remove the

encumbrance of the Void Judgment from such titles. Plaintiffs Bennie Jaehne, Herman Jaehne, and Joe W. Holt seek hereby to quiet the title to their stock of Flojo as against the claims of the Browning Interests based on the Void Judgment.

3. These plaintiffs assert that the Void Judgment is void upon the same grounds and by reason of the same facts that make such judgment void as to the other Plaintiffs as hereinabove set forth. In addition, however, these Plaintiffs assert that such judgment is void, invalid, and ineffective as to them because they were not parties thereto or to the legal proceedings which resulted in the Void Judgment and accordingly, they are not bound thereby in any way.

4. Plaintiffs seek hereby a declaratory judgment that the Void Judgment is void as to all parties or, in the alternative is void, invalid, and ineffective as to them. Plaintiffs further seek a declaratory judgment that no Defendant has any valid claim for damages against any of these Plaintiffs or any valid claim of title to any of the assets of any of these Plaintiffs.

5. These Plaintiffs further show to the Court that they have incurred various fees and expenses, and suffered various other damages, caused by Defendants arising out of the provisions of the Void Judgment, purportedly affecting them and their properties and out of the void proceedings that resulted in the Void Judgment and out of subsequent proceedings and actions resulting from the Void Judgment. These Plaintiffs seek recovery of all such damages from Defendants, together with their costs, expenses, and attorney's fees herein.

XX

Count Fifteen

Claims for Declaratory and Injunctive Relief

A. All Plaintiffs seek hereby, pursuant to Article 2524-1 of the Revised Civil Statutes of Texas, a declaratory judgment that the Void Judgment is void, a nullity, and unenforceable, and that Defendants have acquired no legal rights, powers, privileges or immunities thereunder. All Plaintiffs similiarly (sic) seek a declaratory judgment that the underlying claims of the Browning Interests are invalid and non-meritorious as to all Plaintiffs.

* * *

XXI

PRAYER

Wherefore, Plaintiffs pray that Defendants be cited to answer and appear herein and that

A. Each Plaintiff recover from the Browning Interests his titles, quiet his titles, remove the encumbrances from his title, and obtain partition of real property interests, all as sought by each Plaintiff hereinabove;

B. Each Plaintiff recover from Defendants his actual and exemplary damages as sought by each Plaintiff herein, together with pre-judgment interest, costs and attorneys fees;

C. Plaintiffs obtain declaratory relief and judgment as sought herein; and

D. A temporary restraining order be issued without notice restraining all Defendants, their agents, attorneys, servants and employees, from directly or indirectly:

1. Accepting or receiving from the Trustee any conveyance, assignment transfer or turnover of, or attempting in any way to obtain title, possession or control of, the home, homestead and farm of Brenda Holloway and Pat S. Holloway in Lee County, Texas or any oil and gas working interests acquired by the Trustee from Humble; and

2. Causing or permitting, or taking any action whatever which would or might cause or permit, any purchaser of or payor for production from or attributable to any property interest standing of record in any County of Texas in the name of Marcy Holloway, Catherine Gail Holloway, Patrick Lee Holloway, Pat S. Holloway as Trustee of Catherine Gail Holloway, or Pat S. Holloway as Trustee for Patrick Lee Holloway to cease, interrupt or suspend making payments of the proceeds thereof currently to any of these parties as such payments have heretofore been made;

and that Defendants be cited to appear and show cause and that upon such hearing a temporary injunction be issued enjoining Defendants as they have been temporarily restrained and granting such other temporary injunctive relief as to which Plaintiffs may show themselves entitled at such hearing, and that upon final hearing hereof a permanent injunction be issued granting to Plaintiff such injunctive relief as to which they may have shown themselves entitled; and

E. Plaintiffs have such other and further relief, at law or in equity, as to which they may show themselves entitled by this pleading or proper amendment.

Respectfully submitted,

LAW OFFICES OF
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/s/ Dale Ossip Johnson
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Attorneys for Plaintiffs

APPENDIX E

NO. 8066

BENNIE C. JAEHNE, et al., Plaintiffs,	§	IN THE DISTRICT COURT OF LEE
v.	§	COUNTY, TEXAS 21st JUDICIAL DISTRICT
MICHAEL G. STARNES, et al., Defendants.	§	

NO. 8076

MARCY HOLLOWAY, et al., Plaintiffs,	§	IN THE DISTRICT COURT OF LEE
v.	§	COUNTY, TEXAS 21st JUDICIAL DISTRICT
JANE BROWNING, et al., Defendants.	§	

AMENDED PARTIAL JUDGMENT
AND ORDER OF SEVERANCE

CAME ON for hearing the Motion for Partial Summary Judgment of the Defendants Jane H. Browning, individually and as Co-Independent Executrix of the Estate of William W. Browning, Jr., Deceased; Michael G. Starnes, individually and as Co-Independent Executor of the Estate of William W. Browning, Jr., Deceased, and as Trustee for the Browning Children's Trust and as Special Trustee; Katherine (sic) Agnes Land Starnes, individually; Katherine (sic) Louise Browning Cook, individually; Averville Adams Browning Dawson, individually; William Webb Browning, III, individually; Winifred Fallon Browning Vaughn, individually; and Robert Holland

Browning, individually (hereafter collectively referred to as "the Browning Interests").

On April 3, 1991, the Court granted Browning Interests' Motion for Partial Summary Judgment, and entered its April 3, 1991 Partial Judgment and Order of Severance. Because the April 3, 1991 Judgment does not reflect the Court's holdings in this case, the Court hereby vacates its April 3, 1991 Judgment, and enters this Amended Partial Judgment and Order of Severance.

The Court finds that Plaintiffs Ted R. Ferguson, Humble Exploration Company, Inc. (now known as HECI Exploration Company) and Sterling Pipeline Company have non-suited all of their claims. Those claims are therefore dismissed without prejudice. Pat S. Holloway, individually, Pat S. Holloway as representative of the estate of Pat S. Holloway, and Pat S. Holloway as Trustee for Catherine Gail Holloway and Patrick Lee Holloway, Brenda Holloway, March Holloway, Catherine Gail Holloway, Patrick Lee Holloway, Stacey Holloway, and Shelly Holloway have nonsuited all of their claims asserting the invalidity or enforceability of the judgment rendered by the 162nd Judicial District Court of Dallas County, Texas in Cause No. 79-9623-I, styled *Jane H. Browning, et al. v. Pat S. Holloway, et al.* (hereinafter "the *Browning v. Holloway* Judgment"). Those claims are dismissed without prejudice. The Court further finds that Plaintiff Don Navarro, as Trustee of Pat S. Holloway, did not appeal from this Court's order of January, 1986, dismissing this cause of action and, therefore, he is no longer a party to this cause of action.

Having considered the Browning Interests' Motion for Partial Summary Judgment, the Opposition of Bennie C. Jaehne and Herman Jaehne to Motion for Partial Summary Judgment of the Browning Interests, the Reply of the Browning Interests to the Opposition of Bennie C. Jaehne and Herman Jaehne to Motion for Partial Summary Judgment, the summary judgment evidence, the pleadings, the record and the written and oral arguments of counsel, the Court finds that the Browning Interests' Motion for Partial Summary Judgment should be granted.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that Joe W. Holt take nothing and that his claims are dismissed with prejudice.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that Bennie C. Jaehne, Herman Jaehne, and Flojo Trading Corporation take nothing on any of their claims attacking the validity or enforceability of the *Browning v. Holloway* Judgment and all other claims against the Browning Interests, their agents, employees, attorneys or servants for conduct involved in the litigation of that cause of action, including any past or current enforcement efforts instituted by the Browning Interest (sic) in aid of the *Browning v. Holloway* Judgment. All such claims are hereby dismissed with prejudice.

Due to the multiple, interrelated and complicated nature of the pleadings on file in these consolidated cases, the Court is of the opinion that the severance of all undecided issues from those decided herein will expedite a just and fair adjudication of all claims and therefore ORDERS that any claims not decided and adjudicated herein are hereby severed into a new cause of action,

which shall be styled "Bennie C. Jaehne, et al. vs. Jane H. Browning, et al." The district clerk shall issue a new cause number and file this order in the jacket of such severed cause number. In order to clarify what issues will be pending in the severed case, the Plaintiffs are hereby ORDERED to file by May 3, 1991, in such severed cause number an amended petition setting forth any claims not adjudicated in this cause of action which they wish to pursue further. No claims in the severed cause of action shall attack the validity of the *Browning v. Holloway* Judgment or raise any other claims against the Browning Interests, their agents, employees, attorneys or servants for conduct involved in the litigation of that cause of action including any past or current enforcement efforts instituted by the Browning Interests. In the event any of the Plaintiffs do not file an amended petition in the severed cause by May 3, 1991, the severed cause shall be subject to dismissal.

SIGNED this 18 day of April, 1991.

/s/ Harold Towslee
Harold Towslee, Judge
21st District Court of Lee
County, Texas

APPENDIX F

IN THE COURT OF APPEALS,
THIRD DISTRICT OF TEXAS

AT AUSTIN

JUDGMENT RENDERED JULY 1, 1992

NO. 3-91-256-CV

FLOJO TRADING CORPORATION, HERMAN JAEHNE AND BENNIE C. JAEHNE V. JANE H. BROWNING, INDIVIDUALLY AND AS CO-INDEPENDENT EXECUTRIX OF THE ESTATE OF WILLIAM W. BROWNING, JR., DECEASED, AND AS TRUSTEE FOR THE BROWNING CHILDREN'S TRUST AND AS SPECIAL TRUSTEE; KATHERINE AGNES LAND STARNES, ET AL. APPEAL FROM 21ST DISTRICT COURT OF LEE COUNTY BEFORE JUSTICES JONES, KIDD AND B. A. SMITH; JUSTICE SMITH NOT PARTICIPATING AFFIRMED – OPINION BY JUSTICE KIDD

THIS CAUSE came on to be heard on the transcript of the record of the court below, and the same being considered, because it is the opinion of this Court that there was no error in the trial court's judgment: IT IS THEREFORE considered, adjudged and ordered that the judgment of the trial court be and is hereby in all things affirmed. It is FURTHER ordered that the appellant, Flojo Trading Corporation, as principal, and Bennie C. Jaehne of P. O. Box 726, Giddings, Texas 78942, and Herman Jaehne of 276 Sunrise, Giddings, Texas 78942, as sureties on the cost bond on appeal herein; and Herman Jaehne and Bennie C. Jaehne as principals, and Mark Jaehne of P. O. Box 726,

Giddings, Texas 78942, and Carolyn Jaehne of 276 Sunrise, Giddings, Texas 78942, as sureties on the cost bond on appeal herein, pay all costs of this appeal; and that this decision be certified below for observance.

APPENDIX G

IN THE COURT OF APPEALS,
THIRD DISTRICT OF TEXAS,
AT AUSTIN

NO. 3-91-256-CV

FLOJO TRADING CORPORATION, HERMAN JAEHNE AND BENNIE C. JAEHNE,

APPELLANTS

vs.

JANE H. BROWNING, INDIVIDUALLY AND AS CO-INDEPENDENT EXECUTRIX OF THE ESTATE OF WILLIAM W. BROWNING, JR., DECEASED, AND AS TRUSTEE FOR THE BROWNING CHILDREN'S TRUST AND AS SPECIAL TRUSTEE; KATHERINE AGNES LAND STARNES, ET AL.,

APPELLEES

FROM THE DISTRICT COURT OF LEE COUNTY, 21ST JUDICIAL DISTRICT

NO. 8066/8076, HONORABLE HAROLD TOWSLEE, JUDGE PRESIDING

PROCEDURAL BACKGROUND

This appeal springs from the unrelenting battle between the Holloways and the Brownings, which began in 1979. Although the complicated facts of this case and related cases already fill many pages of the state and

federal reporters,[1] for the sake of clarity, we recount only the pertinent events leading to this appeal.

On September 12, 1979, the Browning family (Brownings) initiated a suit against Pat Holloway, Humble Exploration Company (Humble), and others in the 193rd Judicial District Court of Dallas County, Texas. In that suit for fraud and breach of fiduciary duties, the Brownings claimed they were the equitable owners of substantially all of Humble's and Holloway's assets and sought to impose a constructive trust on those assets, as well as to collect actual and exemplary damages.

On May 26, 1982, a group of investors sued Holloway and Humble in the 162nd Judicial District Court of Dallas County, claiming that the defendants wrongfully "shut in" oil and gas wells jointly owned by the investors and Humble. Because the Brownings claimed ownership in

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[1] *See Browning v. Navarro*, 826 F.2d 335 (5th Cir. 1987); *Holloway v. Walker*, 784 F.2d 1287, *reh'g denied*, 790 F.2d 1170 (5th Cir. 1986); *Holloway v. Walker*, 765 F.2d 517 (5th Cir. 1985); *Browning v. Navarro*, 743 F.2d 1069 (5th Cir. 1984), *rev'g* 37 B.R. 201 (N.D. Tex. 1983); *Holloway v. Fifth Court of Appeals*, 767 S.W.2d 680 (Tex. 1989); *Browning v. Placke*, 698 S.W.2d 362 (Tex. 1985); *Starnes v. Holloway*, 779 S.W.2d 86 (Tex. App. 1989, writ denied); *Browning v. Ryan*, 756 S.W.2d 379 (Tex. App. 1988, orig. proceeding); *Humble Exploration Co. v. Browning*, 677 S.W.2d 111 (Tex. App. 1984), *en banc op. on motion to reinstate*, 690 S.W.2d 321 (Tex. App. 1985, writ ref'd n.r.e.), *cert. denied* 475 U.S. 1065 (1986); *Humble Exploration Co. v. Walker*, 641 S.W.2d 941 (Tex. App. 1982, orig. proceeding); *Humble Exploration Co. v. Fairway Land Co.*, 641 S.W.2d 934 (Tex. App. 1982, writ ref'd n.r.e.); *Browning v. Holloway*, 620 S.W.2d 611 (Tex. App.), *writ ref'd n.r.e. per curiam*, 626 S.W.2d 485 (Tex. 1981).

the Humble and Holloway assets, the Brownings were named as defendants in that case.

These two cases were consolidated and transferred to the 162nd Judicial District. Judge Dee Brown Walker then granted the Brownings' request for a separate and expedited trial of the 1979 case (the Browning case). After a month-long trial, Judge Walker rendered judgment *non obstante veredicto* in favor of the Brownings (the Walker judgment), imposing a constructive trust on Humble's and Holloway's assets and awarding the Brownings $72,000,000 in actual damages and $10,000,000 in exemplary damages.

In addition to judgment against Humble and Holloway, the Walker judgment awarded the Brownings judgment against a separate entity, Flojo Trading Corporation (Flojo), one of the appellants in this cause. It is uncontested that Flojo was not named as a party in the Browning case, was never served with any pleadings in that case, and never appeared before Judge Walker. The Walker judgment nevertheless contained findings of fact that Flojo was the alter-ego of Pat Holloway, and that Flojo was formed and operated in bad faith to defraud the Brownings.[2] The Walker judgment then imposed a constructive trust on one hundred percent of Flojo's stock and ordered that Flojo, along with Pat Holloway, Humble, Holloway Exploration Company, and Sterling

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[2] Because the record in this present appeal does not contain the pleadings or statement of facts from the Browning case, we must presume that they would support the trial court's judgment. *See Haynes v. McIntosh*, 776 S.W.2d 784, 785 (Tex. App. 1989, writ denied).

Pipeline Company, was jointly and severally liable for $70,000,000 of the total judgment awarded the Brownings. Holloway appealed the Walker judgment and also pursued collateral attacks and bill of review proceedings in several courts.

The present appeal originates from a 1985 collateral attack on the Walker judgment, brought in Lee County by Pat Holloway, Flojo, Bennie and Herman Jaehne (the Jaehnes), and several Holloway family members. The Lee County district court initially declared the Walker judgment void on the grounds that certain indispensable parties were not joined in that suit. The Texas Supreme Court overruled that action by a conditional grant of writ of mandamus which held that the failure to join indispensable parties does not render a judgment void. *See Browning v. Placke*, 698 S.W.2d 362 (Tex. 1985). After vacating the order that declared the Walker judgment void, the Lee County district court then entered another order dismissing the cause for want of jurisdiction. This Court, in a 1987 unpublished opinion, held that the Lee County district court erred in dismissing the cause for want of jurisdiction and remanded the matter to the trial court for a disposition of all of the causes of action pleaded by the parties. *Jaehne v. Starnes*, No. 14,693 (Tex. App., Sept. 23, 1987, no writ).

On remand to the Lee County District Court, both Flojo and the Brownings filed motions for partial summary judgment in 1991.[3] The trial court granted the

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[3] In a bill of review proceeding, the Dallas district court enjoined Holloway and all persons acting in concert with Holloway from instituting or pursuing any further collateral attacks on the Walker judgment in any court. Holloway and his family

Brownings' motion, and Flojo and the Jaehnes (Appellants) now appeal.

ANALYSIS

A. The Brownings' 1991 Motion for Partial Summary Judgment.

In their 1991 motion, the Brownings moved for partial summary judgment against Flojo and the Jaehnes on their claims attacking the validity of the Walker judgment, asserting the following grounds: (1) the doctrines of res judicata, collateral estoppel, or law of the case bar all of the plaintiffs' collateral attacks on the Walker judgment; (2) the judgment in *Holloway v. Starnes*, No. 86-07704-I, in the Dallas County district court permanently enjoined Pat Holloway and all persons acting in concert with him from pursuing any claims attacking the validity of the Walker judgment; (3) the judgment of the United States district court in *Browning v. Navarro*, No. 83-0380-H, enjoined Pat Holloway and all persons acting in concert with him from attempting to re-litigate any claim or legal issues which could have been asserted in *Holloway v. Walker* or in *Browning v. Navarro*; (4) the plaintiffs' allegations include non-jurisdictional matters which do not support a collateral attack; (5) the jurisdictional recital in the Walker judgment is conclusive and

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members therefore non-suited themselves in this cause in February 1991. The remaining parties, Flojo and the Jaehnes, who own approximately thirty-seven percent of Flojo's stock, continue to press their claims that the Walker judgment is void as to Flojo, the Jaehnes, Holloway, and Humble.

cannot be contradicted in this collateral attack; and (6) Flojo cannot sue or defend a suit in state court because its charter was revoked for failure to pay franchise taxes.

Flojo did not respond to the Brownings' motion for summary judgment. The Jaehnes opposed the Brownings' motion only on the basis that neither Flojo nor any of its legal or beneficial stockholders was named as a defendant, served with process, or appeared in the original Browning case that resulted in the Walker judgment. Thus, appellants presented to the trial court no rebuttal to the Brownings' grounds for summary judgment and established no fact issues regarding any of the Brownings' grounds for summary judgment. Without indicating the specific grounds for granting summary judgment, the trial court ordered that Flojo and the Jaehnes take nothing on any of their claims attacking the validity of the Walker judgment.

On appeal, appellants assert in their first point of error that the trial court erred in granting the Brownings' motion for partial summary judgment because appellants were not named as defendants or served with process in the original Browning case in which Judge Walker entered judgment against Flojo. Although this assertion is uncontested and would normally support a collateral attack on a judgment, it cannot now serve as a basis for this Court to reverse this summary judgment. We will explain.

We acknowledge that a judgment may not properly be entered against a party who is not before the trial court. *Mapco, Inc. v. Carter*, 817 S.W.2d 686, 686 (Tex. 1991). When a court has no jurisdiction over the parties or

property, no jurisdiction over the subject matter, or no jurisdiction to enter the particular judgment entered, that court's judgment is void and subject to collateral attack in another court of equal jurisdiction. *See Browning v. Placke*, 698 S.W.2d 362, 363 (Tex. 1985); *Austin Indep. Sch. Dist. v. Sierra Club*, 495 S.W.2d 878, 881 (Tex. 1973); *see generally* Gus M. Hodges, *Collateral Attacks on Judgments*, 41 Tex. L. Rev. 163 (1962).

Because lack of jurisdiction is a fundamental error which may be raised for the first time on appeal, this Court could normally consider appellants' assertion that judgment against them was void because they were not parties to the original Browning case. *See Mapco*, 817 S.W.2d at 687. But we may not now review whether the Walker judgment is void as to appellants, since one of the stated grounds in the Brownings' motion for summary judgment was that all of Flojo's and the Jaehnes' grounds for this collateral attack on the Walker judgment have been litigated in other cases; thus, the doctrines of res judicata, collateral estoppel, and law of the case bar the present collateral attack.

Because appellants have litigated these same issues before another court in a collateral attack and bill-of-review proceeding and the issues have been decided against appellants, they may not continue to re-urge the same matters in other courts of equal jurisdiction until they obtain a result favorable to them. Once parties litigate issues in a fair forum, that result should be binding. *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1, 6 (Tex. 1986). Yet appellants made no effort to challenge in a response to the Brownings' motion the contention that their collateral attack is barred. Appellants' failure to challenge the

Brownings' grounds for partial summary judgment at the trial level, combined with the single point of error appellants now assert regarding the trial court's granting of summary judgment, leaves this Court unable to look behind the summary judgment and fully determine whether the doctrines of res judicata, collateral estoppel, and law of the case are in fact a bar to this collateral attack.

Appellants could have cured their failure to respond to the Brownings' asserted grounds for summary judgment by urging this Court to reverse the summary judgment on the basis that the Brownings' motion was insufficient as a matter of law to support summary judgment. *See City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 679 (Tex. 1979). Appellants did not do so.

Appellants also could have asserted a general point of error that the trial court erred in granting summary judgment, allowing argument as to all possible grounds upon which the trial court should have denied summary judgment. *See Malooly Bros., Inc. v. Napier*, 461 S.W.2d 119, 121 (Tex. 1970). As noted, appellants did not pursue this option, but merely re-urged on appeal their original position that the Walker judgment is void as to them because appellants were not named as defendants or served with process in the original Browning case.

Mindful of the need to construe a point of error broadly to favor a just and equitable result, we have reviewed appellants' brief for arguments which are not framed as points of error but which could defeat the Brownings' summary judgment. *See Holley v. Watts*, 629 S.W.2d 694, 696 (Tex. 1982). Appellants offer a partial

response to the Brownings' assertions that res judicata, collateral estoppel, and law of the case bar the present collateral attack. Specifically, appellants contend that the judgment in *Holloway v. Starnes*, No. 86-07704-I, in the Dallas District Court of Dallas County, 162nd Judicial District (the Dallas Bill of Review) does not preclude the present collateral attack. The judgment in the Dallas Bill of Review denied all of plaintiffs' claims and permanently enjoined Pat Holloway and all persons acting in concert with him from pursuing any claims attacking the validity of the Walker judgment. Flojo was a plaintiff in the Dallas Bill of Review.

Appellants now argue that Flojo could not have participated in the Dallas Bill of Review because Flojo's charter had been revoked for failure to pay franchise taxes. Appellants note that if corporate privileges are forfeited, a corporation loses the right to sue or defend in a court of this state. *See* Tex. Tax Code Ann. § 171.252 (1982). Because Flojo had forfeited its charter and corporate privileges, appellants argue that Flojo did not have a full and fair opportunity to litigate its claims in the Dallas Bill of Review. They contend that the judgment in that suit therefore cannot operate as a bar to the present cause.

We believe that Flojo is estopped to make this argument. The record reflects that Flojo forfeited its identification number in September 1982, and its charter in February 1984, for failure to pay its franchise taxes. This forfeiture does not appear to be the Brownings' fault, as appellants claim in their brief, because the Brownings did not obtain control of Flojo's records until September 1986. Holloway, along with Flojo and the Jaehnes, filed the Lee

County collateral attack in 1985. Then Holloway filed *Holloway v. Starnes*, the Dallas Bill of Review, in 1986 in the Dallas district court. As noted, Flojo was a named plaintiff in that suit. Thus, these two suits were essentially parallel attacks on the validity of the Walker judgment, and both were initiated at a time when Flojo's charter was revoked.

Nothing in the record suggests that Flojo attempted to remove itself as a party in the Dallas Bill of Review. Further, nothing in the record suggests that Flojo or the Jaehnes attempted to revive Flojo's charter during the entire time the Dallas Bill of Review was pending before the 162nd District Court. Only after the Dallas district court rendered a judgment on January 10, 1991, which permanently enjoined any further attacks on the validity of the Walker judgment, did Flojo assert its inability to participate in the Dallas Bill of Review. At that time, Joe Holt, Flojo's president, paid the overdue fees, taxes, and penalties, and had Flojo's charter reinstated on March 4, 1991. Four days later Flojo filed its motion for partial summary judgment in the present cause.

Flojo is estopped from taking inconsistent positions in these judicial proceedings. *Cf. Smith v. Chipley*, 42 S.W.2d 645, 647 (Tex. Civ. App. 1941, writ ref'd n.r.e.). We do not believe that Flojo should be allowed to participate as a plaintiff in the Lee County collateral attack from 1985 until 1991, and in the Dallas Bill of Review from 1986 until 1991, and then, one month before the suit is resolved in Lee County, pay the franchise tax, claim that Flojo heretofore had not been a plaintiff in either suit, and attempt to escape the effects of the Dallas judgment. The

record does not reflect why Flojo made no move to reinstate its charter at an earlier time. But allowing Flojo to switch its position at the eleventh hour would permit this corporate plaintiff to escape the res judicata effects of an unfavorable judgment on the basis of *its own failure to pay its franchise-tax obligation*. *Cf. Hardwick v. Austin Galleries*, 779 S.W.2d 438, 441 (Tex. App. 1989, writ denied).

We therefore reject appellants' argument that the judgment in the Dallas Bill of Review is not a bar to the present collateral attack. Moreover, we note that appellants did not respond in full to the argument in the Brownings' motion for partial summary judgment that res judicata, collateral estoppel, and law of the case bar the present collateral attack.

Appellants' failure to assert a general assignment of error or specifically challenge all of the grounds for summary judgment is fatal to their appeal. An examination of the Brownings' motion reveals several possible bases for the trial court's judgment, only one of which is that res judicata, collateral estoppel, and law of the case bar the present collateral attack. This summary judgment must stand, since it may have been based on a ground appellants did not specifically challenge and since there was no general assignment that the trial court erred in granting summary judgment. *See Malooly Bros.*, 461 S.W.2d at 121. Accordingly, we overrule this point of error.

B. Flojo's 1991 Motion for Summary Judgment.

In their second point of error, appellants assert that the trial court erred in denying Flojo's 1991 motion for

partial summary judgment. However, nothing in the record reflects that the trial court ever denied – or even heard – Flojo's motion. In fact, the record reflects that the trial court rendered judgment on the Brownings' motion even before the date set for the hearing on Flojo's motion.

Appellants contend, however, that the district court denied their motion for partial summary judgment in that same judgment granting the Brownings' motion. That judgment ordered that appellants take nothing on any of their claims attacking the validity of the Walker judgment and dismissed those claims with prejudice. The judgment then severed all of appellants' undecided issues into a new cause of action. We cannot agree with appellants that the trial court's action overruled appellants' motion for summary judgment by implication. *See Starnes v. Holloway*, 779 S.W.2d S.W.2d 86, 98 (Tex. App. 1989, writ denied).

The judgment granting the Brownings' motion states that the court considered the following in reaching its decision:

> [T]he Browning Interests Motion for Partial Summary Judgment, the opposition of Bennie C. Jaehne and Herman Jaehne to Motion for Partial Summary Judgment of the Browning Interests, the Reply of the Browning Interests to the Opposition of Bennie C. Jaehne and Herman Jaehne to Motion for Partial Summary Judgment, the summary judgment evidence, the pleadings, the record and written and oral arguments of counsel. . . .

Nowhere does the judgment address Flojo's motion for partial summary judgment. Given the trial court's specificity in listing the motions and pleadings it considered in rendering judgment, we conclude that the trial court did not hear or rule on Flojo's motion.

The record does not reflect that appellants objected to the trial court's failure to rule on their motion. Where there is no ruling on a motion and no objection to the trial court's refusal to rule, the error, if any, is not preserved. Tex. R. App. P. Ann. 52(a) (Pamph. 1992); *see also Starnes*, 779 S.W.2d at 98; *Lynch v. Bank of Dallas*, 746 S.W.2d 24, 24-25 (Tex. App. 1988, writ denied). Further, the trial court's refusal to hear a motion for summary judgment is not an error that can be cured on direct appeal. *See Starnes*, 779 S.W.2d at 98.

We note that the facts in this cause are distinguishable from a situation in which both parties moved for summary judgment and one motion was granted, but the other denied. In that case, the appellate court should determine all questions presented and, if it finds reversible error in the judgment, reverse the trial court and render such judgment as the trial court should have rendered, including judgment for the other movant. *See Jones v. Strauss*, 745 S.W.2d 898, 900 (Tex. 1988).

Because appellants failed to obtain a ruling on their motion and failed to preserve error, this Court cannot consider issues related to Flojo's motion for partial summary judgment. Accordingly, we overrule this second point of error.

C. The 1985 Motions for Partial Summary Judgment.

In points of error three through six, appellants complain that the trial court erred in denying four motions for partial summary judgment that Holloway filed in 1985 when the parties first brought this collateral attack in the Lee County district court. The trial court heard these motions in 1985, along with a number of other pleadings and motions, and rendered judgment dismissing the cause for want of jurisdiction one year later.

As noted, this Court ruled in a 1987 unpublished opinion that the Lee County district court erred in dismissing the cause for want of jurisdiction and remanded the matter to the trial court. That opinion did not address the denial of any of appellants' 1985 motions for summary judgment.

On remand, the parties filed in 1991 the motions for partial summary judgment that form the basis of the first two points of error in this appeal. Nothing in the record reflects that appellants re-urged the 1985 motions complained of in points of error three through six. Thus, the trial court could not have considered the 1985 motions in the 1991 judgment that led to the current appeal.

We believe that appellants, having failed to re-urge these four motions after remand, may not resurrect them now on appeal. Appellants provide us with no authority to the contrary. For the reasons set forth in our second point of error, these issues have not been properly preserved on this appeal. Accordingly, we overrule these points of error.

CONCLUSION

We will affirm the judgment of the trial court.

Mack Kidd, Justice

[Before Justices Jones, Kidd and B. A. Smith; Justice Smith not participating]

Affirmed

Filed: July 1, 1992

[Do Not Publish]